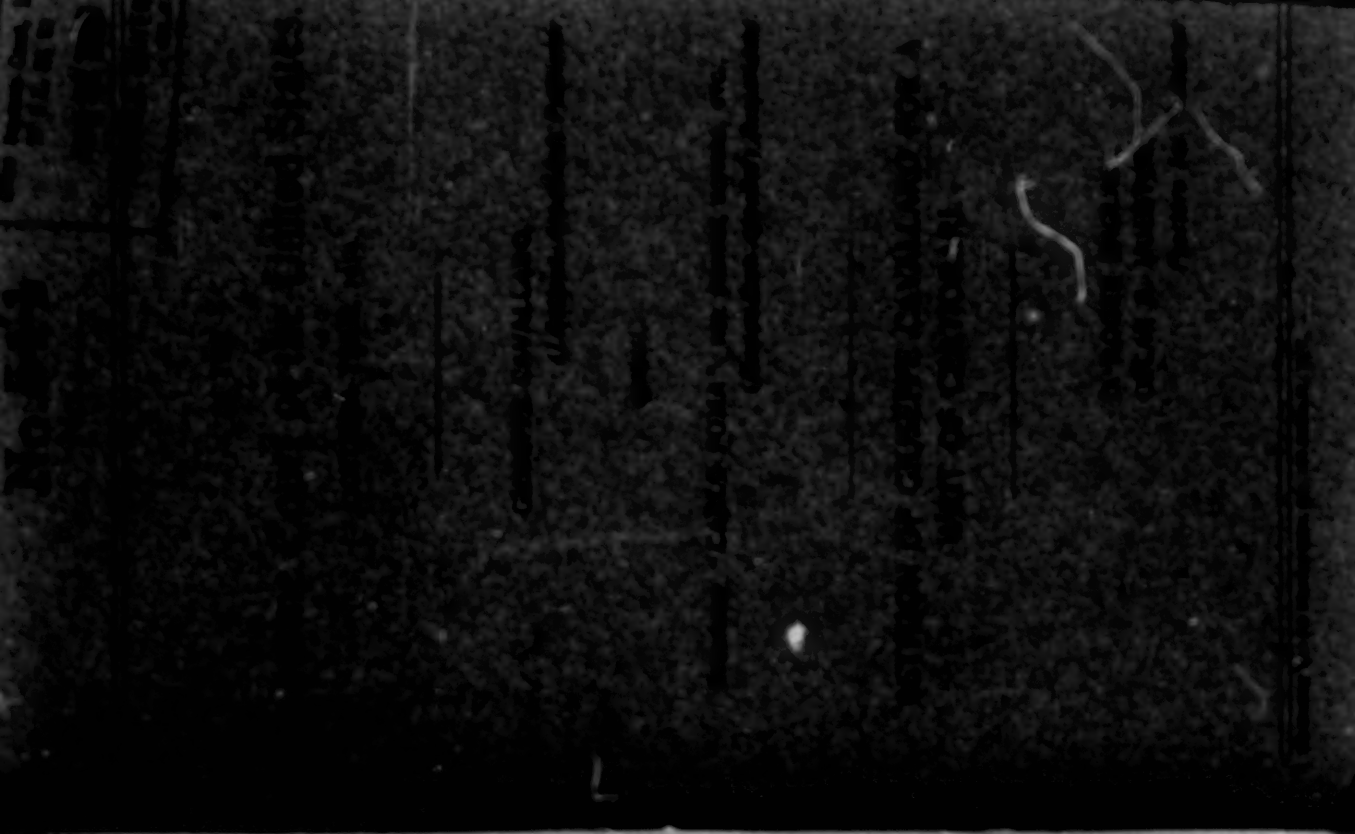

Supreme Court of the United States

1

OCTOBER TERM, 1919

GIUSEPPE CAVALLARO,
(*Libellant-Appellant*)
Petitioner,

against

Steamship "CARLO POMA", her engines, boilers, etc.,
(*Respondent-Appellee*)
Respondent.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The said petitioner respectfully shows to this Honorable Court as follows:

1. Your petitioner was, at the time of the commencement of this suit, engaged in business as an importer and dealer in fruits, with an office in New York City.

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2. The steamship "Carlo Poma" was a general ship engaged in the common carriage by water of merchandise for hire between the ports, among others, of Messina, Italy, and New York.

3. On June 5th, 1918, a shipment consisting of ten thousand seven hundred and twelve (10,712) boxes of lemons in good order was loaded on the "Carlo Poma", then lying at Messina and bound for New York. The shipment was consigned to your petitioner in accordance with the terms of the usual bills of lading regularly issued by the steam-

4 ship's commercial agents at Messina, Lagana & Company, to private individuals, some of whom were residents of Italy, some residents of the United States and some residents of Canada, and which called for the delivery of the goods therein mentioned in like good order and condition as when shipped.

4. The "Carlo Poma" sailed from Messina about June 5, 1918, but did not arrive at New York until September 16, 1918, when the lemons were found to be seriously damaged, due, your petitioner claims, to the negligence of the steamship, her owners and charterers, in the loading, stowing, custody and
5 care of the consignment and the unseaworthiness and unsuitability of the "Carlo Poma" for the voyage. Your petitioner was the owner of this shipment prior to its arrival and up to the time of the filing of the libel in this case, and the loss sustained by him, through the damage done this shipment as above set out, is sixty thousand dollars.

5. On September 26th, 1918, the libel herein was filed in the office of the Clerk of the District Court of the United States for the Southern District of New York, setting out substantially the above allegations.

6. On September 28th, 1918, the Italian Ambassa-
6 dor Extraordinary and Plenipotentiary to the government of the United States, Count V. Macchi Di Cellere, through Attorneys appearing specially, filed with the clerk of the said District Court a suggestion that the said steamship "Carlo Poma", at all times mentioned in the libel and at the time of the filing of said suggestion, was owned by the government of the Kingdom of Italy, being registered in the name of the Italian State Railways, a branch of said government, and in the possession

of the Italian government in the person of a master and crew employed and paid by said government, and that the said steamship was to transport back to Italy a cargo belonging to the Italian government. 7

7. On September 28, 1918, upon motion of the proctors for the "Carlo Poma", appearing specially, the Honorable Charles M. Hough, sitting in the said District Court, issued an order staying the execution of the process of attachment against the "Carlo Poma", her engines, boilers, etc., issued to the United States Marshal under this libel, and stated as his reason for so staying execution that it was his opinion that the said District Court should not and will not take jurisdiction of the case because the "Carlo Poma" was represented to be public property of the Italian government and in public use, and the representation was not denied. 8

Your petitioner duly appealed from the order staying execution to the United States Circuit Court of Appeals for the Second Circuit.

8. On appeal the Circuit Court of Appeals affirmed the order. In its opinion, written by Judge Ward, the Court said, that, because of the international comity due from one sovereign to another, it is the law of the United States that no process shall be permitted against property of a foreign sovereign under any circumstances, provided the property is in the actual possession of a foreign sovereign at the time process is served; and that this general rule is not affected by section 9 of the United States Shipping Act of September 7, 1916, which provides: 9

> "Every vessel purchased, chartered, or leased from the board, shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations and liabilities

governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

9. On May 26th, 1919, the order for a mandate was filed in the office of the Clerk of the Circuit Court of Appeals for the Second Circuit and a mandate issued accordingly the same day from said Circuit Court to said District Court.

10. On July 1st, 1919, without prejudice to the rights of your petitioner to apply to this Court for a writ of *certiorari*, an order was duly made by the
11 United States District Court for the Southern District of New York and entered in the office of the Clerk of the said Court, on the same day, which decreed that the decree of the said Circuit Court of Appeals be made the decree of the said United States District Court and affirmed the order of said District Court entered herein on the 28th day of September, 1918.

The questions of law involved in this case were duly raised and argued by your petitioners in said District Court and Circuit Court of Appeals; are of public importance; and are substantially as follows:

12 1. Can the District Courts of the United States take jurisdiction of a libel against a vessel within their territorial jurisdiction represented to be the public property of a foreign government but which is engaged in the common carriage for hire of freight for private individuals?

2. Is a mere suggestion to the Court by a diplomatic representative of a foreign government, that the vessel libelled is public property in the possession of his government, sufficient and proper to warrant

an order for a stay of process in the United States District Court, on the ground of lack of jurisdiction? 13

3. Should not the claim for immunity from process granted the public property of a foreign government be made by the executive branch of the United States Government to its Courts, as was done in *The Parlement Belge*, L. R. 5 P. D. 197 and *The Exchange*, 7 Cranch, 116?

4. Does not the United States Shipping Act of September 7, 1916, C. 451, Sec. 9 (Sec. 814 e. Comp. St. 1916, 39 Stat. 730) determine the limits of immunity to be extended to public property of foreign governments while engaged as merchant vessels, to wit: 14

> "Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations and liabilities governing merchant vessels whether or not the United States be interested therein as owner, in whole or in part, or holds any mortgage, lien or other interest therein."

5. Is it not the public policy of the United States to limit the immunity from process given public vessels of a foreign government to war vessels and those engaged in some governmental function? 15

6. Does not a foreign government forfeit its claim to immunity from process for a public vessel when it engages it in competitive mercantile trade?

And your petitioners further aver that the present case is one in which it is proper for this Court to issue a writ of *certiorari*, for the following reasons, among others:

1. Because an important question of international comity and public policy is involved.

16 2. Because the public and international interest and the interests of jurisprudence require the decision of this Court upon the question of law involved herein.

3. Because the questions of law herein have not been passed upon by this Court.

4. Because there is a division of opinion in the lower courts on the question how a claim for immunity should be presented to the Court, as may be seen from:

The Maipo, 252 Fed. 627.
The Attualita, 238 Fed. 909.

17 5. Because the Circuit Court of Appeals bases its decision, in large part, on the ground that the provisions of Sec. 9 of the United States Shipping Act of September 7, 1916, apply only to vessels chartered or leased to and in the possession of private individuals and that "Process against such vessels would not disturb the possession of the government"; but this Court has said, in *The United States in re steamship "Lake Monroe"*, since decided (June 2, 1919, No. 30), that Shipping Board vessels are subject to the ordinary liability of a merchant vessel, when commercially operated, even if in the possession of the Government.

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WHEREFORE, your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the Circuit Court of Appeals for the Second Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

GIUSEPPE CAVALLARO.

OSCAR R. HOUSTON,
Petitioner's Attorney.

STATE OF NEW YORK, }
County of New York, } ss.: 19

OSCAR R. HOUSTON, being duly sworn, deposes and says, that he is one of the Proctors for Giuseppe Cavallaro herein; that he participated in the preparation of the foregoing petition, and knows the contents thereof, and that the allegations therein are true as he verily believes.

OSCAR R. HOUSTON.

Subscribed and sworn to before me this 20th day of August, 1919.

CORNING G. MCKENNEE,
Notary Public, New York County.

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WE HEREBY CERTIFY that we have examined the foregoing petition and in our opinion it is well founded and is entitled to the favorable consideration of the Court.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
Counsel.

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22 SIRS:

TAKE NOTICE that we shall submit the foregoing petition for a writ of *certiorari* to the Supreme Court of the United States at the opening of the Court on Monday, October 6th, 1919.

Dated, August 20th, 1919.

Yours, etc.,

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Petitioner.

To:

BURLINGHAM, VEEDER, MASTEN
23 & FEAREY, Esqs.,
Proctors for Respondent.

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